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No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a prison grooming code that prohibits inmates from growing long hair "is the least restrictive means of furthering [the] compelling governmental interest" in prison security, such that it withstands scrutiny under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc-1(a)(1)-(2).

TABLE OF CONTENTS

Page

Statement 1

Argument 5

The Petition Should Be Denied Because There Is No Circuit Split Concerning The Legality Of Prison Grooming Codes Under RLUIPA 5

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Alcatel USA, Inc. v. *DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999) 11

Bisby v. *Crites*, 312 F. App'x 631 (5th Cir. 2009) 6

Brown v. *Chote*, 411 U.S. 452 (1973) 9

Brunskill v. *Boyd*, 141 F. App'x 771 (11th Cir. 2005) 6

City of Boerne v. *Flores*, 521 U.S. 507 (1997) ... 6

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 8

David v. *Giurbino*, 488 F. Supp. 2d 1048 (S.D. Cal. 2007) 9

Diaz v. *Collins*, 114 F.3d 69 (5th Cir. 1997) 4, 5, 6, 7

Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 9

Fegans v. *Norris*, 537 F.3d 897
(8th Cir. 2008) 6, 7

Firefighters Local Union No. 1784 v. *Stotts*,
467 U.S. 561 (1984) 10

Haley v. *Donovan*, 250 F. App'x 202
(9th Cir. 2007) 9

Hamilton v. *Schriro*, 74 F.3d 1545
(8th Cir. 1996) 6

Harris v. *Chapman*, 97 F.3d 499
(11th Cir. 1996) 6, 8

Hoevenaar v. *Lazaroff*, 422 F.3d 366
(6th Cir. 2005) 6, 10

Lathan v. *Thompson*, 251 F. App'x 665
(11th Cir. 2007) 15

Longoria v. *Dretke*, 507 F.3d 898
(5th Cir. 2007) 4, 5, 6, 7

McRae v. *Johnson*, 261 F. App'x 554
(4th Cir. 2008) 6, 7

The Monrosa v. *Carbon Black Export, Inc.*,
359 U.S. 180 (1959) 12

N.Y. State Liquor Auth. v. *Bellanca*,
452 U.S. 714 (1981) 9

Odneal v. *Pierce*, 324 F. App'x 297
(5th Cir. 2009) 14, 15

Pitt News v. *Pappert*, 379 F.3d 96
(3d Cir. 2004) 11

Ragland v. *Powell*, 193 F. App'x 218
(4th Cir. 2006) 6

Ranchers Cattlemen Action Legal Fund United Stockgrowers v. *USDA*, 499 F.3d 1108 (9th Cir. 2007) 11

Ross-Whitney Corp. v. *Smith Kline & French Labs.*, 207 F.2d 190 (9th Cir. 1953) 11

Smith v. *Ozmint*, 578 F.3d 246 (4th Cir. 2009) 14

Smith v. *Ozmint*, No. 04-1819 (D.S.C. Mar. 18, 2010) 14

S. Or. Barter Fair v. *Jackson County*, 372 F.3d 1128 (9th Cir. 2004) 10

Thunderhorse v. *Pierce*, 232 F. App'x 425 (5th Cir. 2007) 3

Thunderhorse v. *Pierce*, 418 F. Supp. 2d 875 (E.D. Tex. 2006) 3

Univ. of Tex. v. *Camenisch*, 451 U.S. 390 (1981) 9, 10

Warsoldier v. *Woodford*, 418 F.3d 989 (9th Cir. 2005) ..... *passim*

Williams v. *Snyder*, No. 08-1908, 2010 WL 750105 (7th Cir. Mar. 5, 2010) 6, 7, 8

Statutes:

Religious Freedom Restoration Act of 1993, 107 Stat. 1488 ..... 4, 6, 8, 12, 15

Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 ... *passim*

28 U.S.C. 636 3

42 U.S.C. 1983 3

42 U.S.C. 2000bb-1(b)(1)-(2) 6

42 U.S.C. 2000cc-1(a)(1)-(2) 3, 6

Miscellaneous:

Ruth Thunderhorse, *Following the Footprints of a Stone Giant—The Life and Times of Iron Thunderhorse* (2007) 2

James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053 (2009) 10, 12

Petition for Writ of Certiorari, *Bisby* v. *Crites*, 130 S. Ct. 487 (2009) (No. 08-10337) 12

Petition for Writ of Certiorari, *Hamilton* v. *Schriro*, 519 U.S. 874 (1996) (No. 96-5016) 12

Petition for Writ of Certiorari, *Harris* v. *Chapman*, 520 U.S. 1257 (1997) (No. 96-8753) 12

Petition for Writ of Certiorari, *Hoevenaar* v. *Lazaroff*, 549 U.S. 875 (2006) (No. 05-11756) 12

Petition for Writ of Certiorari, *Ragland* v. *Powell*, 549 U.S. 1306 (2007) (No. 06-8887) 12

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

1. The Texas Department of Criminal Justice ("TDCJ") has determined that hirsute inmates present special security risks. Prisoners can use long hair to smuggle weapons, drugs, and other contraband, and searching through this kind of hair requires potentially dangerous interactions between guards and prisoners. Long-haired prisoners also present a heightened escape risk, because a fugitive seeking to avoid detection can rapidly change his appearance by cutting off his hair. To mitigate these security risks, the TDCJ grooming code states that a male inmate must wear neatly cut hair that is trimmed in the back and cut around the ears. Pet. 4.

Petitioner is a practitioner of Native American Shamanism who has legally changed his name from William Coppola to Iron Thunderhorse. Pet. App. 4a, 20a, 27a, 43a n.6. He is forbidden by the tenets of his religion to cut his hair. *Id.* at 8a, 27a-28a; see

also *id.* at 69a n.10 (citing Ruth Thunderhorse, *Following the Footprints of a Stone Giant—The Life and Times of Iron Thunderhorse* 87-88 (2007)). Petitioner's beliefs have come into conflict with the TDCJ grooming code due to his imprisonment, a result of his having been convicted of robbery, rape, kidnapping, and attempted escape. See Pet. 7 & n.1; Pet. App. 4a.[1]

At some point during his incarceration, petitioner grew his hair long enough to wear it in braids that fell to his lower back. Pet. App. 4a. Petitioner alleges he was permitted to grow long hair while in administrative segregation at TDCJ's Stiles Unit, although he had to cut it upon entering the prison's general population. *Id.* at 28a, 30a. He kept his severed braids with him at the Stiles Unit. *Id.* Petitioner was transferred to TDCJ's Polunsky Unit in August 2004, *id.* at 4a, 29a, where he resided in general population until his assault on a prison guard in June 2006, *id.* at 5a, 21a. His braids were sent to his wife upon his consequent return to administrative segregation, *id.* at 28a-29a, and are now part of the record, *id.* at 4a n.1.

While confined at the Polunsky Unit, petitioner unsuccessfully sought a religious exemption to the TDCJ grooming code. Pet. App. 5a. He is therefore

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[1] Petitioner claims to have "the safest possible security rating in the Texas prison system." Pet. 27. This factual assertion, for which the petition offers no record support, is difficult to square with petitioner's assault on a prison guard in 2006, Pet. App. 21a, his attempt to escape from prison in 1991, Pet. 7 n.1, and his multiple periods of confinement in administrative segregation, Pet. App. 21a, 28a.

unable to wear his hair at a length that is acceptable under the tenets of his faith. Pet. 4-5.

2. Acting *pro se*, petitioner sued respondents, who are TDCJ officials, under 42 U.S.C. 1983.in the United States District Court for the Eastern District of Texas. Pet. App. 2a, 20a. Among other things, petitioner claimed that the TDCJ grooming code violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803 (codified at 42 U.S.C. 2000cc to 2000cc-5). Pet. App. 6a, 20a-26a. As relevant here, Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" by way of "the least restrictive means." 42 U.S.C. 2000cc-1(a)(1)-(2). Petitioner argued that the grooming code imposed a substantial burden by forcing him to cut his hair, and that the grooming code was not the least restrictive means of achieving TDCJ's compelling interest in prison security. Pet. App. 8a. He sought injunctive relief in the form of a religious exemption to the TDCJ grooming code. *Id.* at 26a.

Petitioner's case was referred to a magistrate judge pursuant to 28 U.S.C. 636. The district court granted respondents' motion for summary judgment and dismissed all of petitioner's claims, including his grooming code claim. *Thunderhorse* v. *Pierce*, 418 F. Supp. 2d 875, 894-895, 899 (E.D. Tex. 2006). Petitioner argued on appeal that he had not filed all of his evidence, and that the magistrate judge failed to give adequate notice that the case would be resolved by summary judgment. *Thunderhorse* v.

Pierce, 232 F. App'x 425, 426 (5th Cir. 2007) (per curiam). Concluding that petitioner had not received sufficient notice, the United States Court of Appeals for the Fifth Circuit vacated the judgment and remanded for further proceedings. *Id.* at 426-427.

On remand, the magistrate judge held a bench trial. Pet. App. 3a, 20a, 26a. "The parties spent a considerable period of time at trial discussing the TDCJ grooming code." *Id.* at 69a. On the strength of Fifth Circuit precedent upholding the TDCJ grooming code against challenges under RLUIPA and its predecessor statute, the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, the district court rejected petitioner's grooming code claim. Pet. App. 69a-70a (citing *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam), and *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997)). As the district court explained, *id.* at 58a-61a, the Fifth Circuit had already held that the TDCJ grooming code is the least restrictive means of furthering the compelling interest in prison security because it removes a hiding place for weapons and contraband, and makes it harder for fugitives to alter their appearance upon escape, see *Longoria*, 507 F.3d at 904; *Diaz*, 114 F.3d at 72-73. The district court denied petitioner's request for an injunction as to the grooming code, while granting other relief not relevant here. Pet. App. 82a-83a.

3. The Fifth Circuit affirmed the judgment. Pet. App. 19a. Regarding the TDCJ grooming code, the court of appeals held that petitioner's RLUIPA claim was foreclosed by its decisions in *Longoria* and *Diaz*. *Id.* at 8a-10a. The court reiterated that "prisoners may hide weapons and other contraband in their

hair," and that "requiring short hair makes it more difficult for an escaped prisoner to alter his appearance." *Id.* at 9a (citing *Longoria*, 507 F.3d at 904, and *Diaz*, 114 F.3d at 73); see also *id.* at 9a n.2 (noting that respondents entered evidence to this effect during bench trial, along with testimony that long hair endangers inmates during altercations). The court considered itself bound by circuit precedent to reject petitioner's invocation of *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005), "in which the Ninth Circuit issued a preliminary injunction, pursuant to RLUIPA, that prevented the California Department of Corrections from enforcing its hair length restriction against a Native American inmate." Pet. App. 10a n.3.

ARGUMENT

The Petition Should Be Denied Because There Is No Circuit Split Concerning The Legality Of Prison Grooming Codes Under RLUIPA

Petitioner contends that "[t]he circuit split over hair length restrictions" warrants review by this Court, Pet. 10, pointing repeatedly to the Ninth Circuit's *Warsoldier* decision, *id.* at 9, 10, 13, 14, 15 n.3. Petitioner is wrong. The legality of prison grooming codes under RLUIPA has not divided the circuits. The Ninth Circuit's limited treatment of this issue arose in the preliminary-injunction context and therefore did not represent that circuit's final disposition. Every circuit that has squarely confronted this issue has concluded that RLUIPA does not prohibit prison grooming codes. In the absence of a genuine conflict among the circuits, the petition should be denied.

1. The Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have all upheld prison grooming codes against RLUIPA challenges, in cases squarely presenting the issue for decision on the merits. See *McRae* v. *Johnson*, 261 F. App'x 554, 558-560 (4th Cir. 2008) (per curiam); *Ragland* v. *Powell*, 193 F. App'x 218, 219 (4th Cir. 2006) (per curiam); Pet. App. 8a-10a; *Bisby* v. *Crites*, 312 F. App'x 631, 632 (5th Cir. 2009) (per curiam); *Longoria* v. *Dretke*, 507 F.3d 898, 904 (5th Cir. 2007) (per curiam); *Williams* v. *Snyder*, No. 08-1908, 2010 WL 750105, at *3 (7th Cir. Mar. 5, 2010) (per curiam); *Fegans* v. *Norris*, 537 F.3d 897, 902-908 (8th Cir. 2008); *Brunskill* v. *Boyd*, 141 F. App'x 771, 776 (11th Cir. 2005) (per curiam); cf. *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 369-372 (6th Cir. 2005) (reversing preliminary injunction that prevented prison officials from enforcing grooming code on RLUIPA grounds). In cases decided prior to *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Fifth, Eighth, and Eleventh Circuits have likewise upheld prison grooming codes under RFRA's substantially identical standard. See *Diaz* v. *Collins*, 114 F.3d 69, 73 (5th Cir. 1997); *Hamilton* v. *Schriro*, 74 F.3d 1545, 1554-1555 (8th Cir. 1996); *Harris* v. *Chapman*, 97 F.3d 499, 504 (11th Cir. 1996).[2]

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[2] RFRA and RLUIPA impose the same standard: a government can justify a substantial burden on religious exercise by showing that the burden is the least restrictive means of furthering a compelling governmental interest. Compare 42 U.S.C. 2000bb-1(b)(1)-(2), with 42 U.S.C. 2000cc-1(a)(1)-(2). Accordingly, courts rely on RFRA precedent in RLUIPA cases. See, *e.g.*, *Fegans*, 537 F.3d at 903; *McRae*, 261 F. App'x at 558 n.2; *Longoria*, 507 F.3d at 901; *Hoevenaar*, 422 F.3d at 368.

These circuits recognize that a grooming code is the least restrictive means of furthering a compelling interest in prison security. After full consideration of the issue, these courts have concluded that long hair and beards facilitate inmates' concealment of weapons and contraband, and frustrate efforts to capture escaped inmates. See, *e.g.*, *Fegans*, 537 F.3d at 903-904 (noting that findings to this effect were the product of "a complete bench trial conducted over three days with ten witnesses"); *Longoria*, 507 F.3d at 904 (noting that findings to this effect in *Diaz*, 114 F.3d at 73, were the result of the district court's "expanded evidentiary hearing"); cf. Pet. 22 (noting that the courts below rejected petitioner's RLUIPA challenge to the TDCJ grooming code only after he had "fully presented all available evidence and * * * fully argued the merits").

For example, the Fourth Circuit cited instances in which inmates hid razor blades, tobacco, wire, and rope in long hair and beards, *McRae*, 261 F. App'x at 559, while the Eighth Circuit spoke of "specific examples showing that inmates had used their hair to conceal contraband and to change their appearance after escaping," *Fegans*, 537 F.3d at 903. Similarly, the Seventh Circuit noted "undisputed evidence" that inmates had used long dreadlocks to "conceal drugs, sharp plastic objects, needles, makeshift blades constructed from pens, and even kitchen knives," as well as "black thread [used] to create makeshift handcuff-saws by coating the thread with toothpaste and letting it harden and dry." *Williams*, 2010 WL 750105, at *1, *3. And as the Eleventh Circuit admitted, "we are unable to suggest any lesser means than a hair length rule" of

addressing these prison security problems. *Harris*, 97 F.3d at 504; see also *Williams*, 2010 WL 750105, at *1, *3 (rejecting as inadequate proposed grooming code alternatives, such as metal detectors, guard-administered hair searches, and self-administered hair searches by inmates).

In light of the detrimental effect of long hair and beards on prison security, and the absence of alternative solutions, circuits that have squarely addressed the issue have held that RLUIPA and RFRA do not foreclose prison grooming codes. These decisions reflect appropriate deference to prison officials. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety."); *id.* at 723 ("Lawmakers supporting RLUIPA * * * anticipated that courts would apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." (internal quotation marks omitted)).

2. Petitioner contends that the foregoing decisions and the decision below conflict with *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005). Pet. 13-14. *Warsoldier* does not create a circuit split worthy of resolution in this Court, because it was not a final decision on the merits. In that case, the Ninth Circuit reversed the district court's denial of a preliminary injunction against enforcement of a prison grooming code, after concluding that the prisoner was likely to succeed on the merits of his

RLUIPA challenge. *Warsoldier*, 418 F.3d at 1002. Judge Pregerson, writing for the court, expressed skepticism as to whether a grooming code is the least restrictive means of achieving the compelling interest in prison security. *Id.* at 998-1001. Noting that some prisons do not limit hair length, *id.* at 999-1000, and that female inmates were not subjected to the grooming code at issue, *id.* at 1000-1001, the court concluded that, "[a]t a minimum, there exists [sic] serious questions going to the merits of Warsoldier's claims," *id.* at 1001.

Warsoldier does not create a circuit split with the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits, notwithstanding Judge Pregerson's skepticism. Arising as it did in the context of a preliminary injunction, *Warsoldier* "may not be considered a 'final judicial decision based on the actual merits of the controversy.'" *N.Y. State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 716 (1981) (per curiam) (quoting *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 396 (1981)). In reviewing the denial of a preliminary injunction, the Ninth Circuit was in no position to speak to "the ultimate merits" of the case. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (quoting *Brown* v. *Chote*, 411 U.S. 452, 457 (1973)). Instead, the Ninth Circuit addressed only the likelihood that Warsoldier's RLUIPA challenge would succeed. *Haley* v. *Donovan*, 250 F. App'x 202, 203 (9th Cir. 2007) ("In [*Warsoldier*], this court held that an inmate challenging [a grooming code] had *shown serious questions* going to the merits of his claim that the regulation violated RLUIPA * * * ." (emphasis added)); *David* v. *Giurbino*, 488 F. Supp. 2d 1048, 1059 (S.D. Cal. 2007) ("In *Warsoldier*, the

Ninth Circuit * * * held that the plaintiff was likely to prevail on the merits of his RLUIPA claim challenging the grooming policy."). As this Court has noted, "likelihood of success" does not equal "success." *Camenisch*, 451 U.S. at 394.[3]

Warsoldier illustrates why "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395. In reversing the denial of a preliminary injunction, the Ninth Circuit faulted the government for "present[ing] only conclusory statements" in defense of its grooming code, and for failing to "discuss whether it ha[d] ever considered a less restrictive approach." *Warsoldier*, 418 F.3d at 998-999. Such failures of proof are symptomatic of "the haste characteristic of a request for a preliminary injunction." *Camenisch*, 451 U.S. at 398; see also *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 603 n.7 (1984) (Blackmun, J., dissenting) ("The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional."); *S. Or. Barter Fair* v. *Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004) ("[D]ecisions on preliminary

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[3] Given that *Hoevenaar* v. *Lazaroff*, 422 F.3d 366 (6th Cir. 2005), and *Warsoldier* both arose in the preliminary-injunction context, those decisions likewise do not create a circuit split. Contra Pet. 13 (asserting that these decisions create a split between the Sixth and Ninth Circuits); James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2114-2115 (2009) (same).

injunctions are just that—preliminary—and must often be made hastily and on less than a full record."). Due to the posture of *Warsoldier*, and the attendant deficiencies of the record in that case, the Ninth Circuit did no more than opine as to the likelihood of success on the merits. See *Warsoldier*, 418 F.3d at 1002.

It remains to be seen how the Ninth Circuit will rule when called to give a final decision, with a full evidentiary record, on the validity of a prison grooming code under RLUIPA. The panel in such a case will not necessarily be bound by *Warsoldier*. Cf. *Pitt News* v. *Pappert*, 379 F.3d 96, 105 (3d Cir. 2004) (Alito, J.) ("[W]here the prior panel stopped at the question of likelihood of success[,] the prior panel's legal analysis must be carefully considered, but it is not binding on the later panel."); *Alcatel USA, Inc.* v. *DGI Techs., Inc.*, 166 F.3d 772, 793 n.85 (5th Cir. 1999) ("[P]ronouncements made during resolution of an appeal of a preliminary injunction are not binding."); *Ross-Whitney Corp.* v. *Smith Kline & French Labs.*, 207 F.2d 190, 194 (9th Cir. 1953) ("The ruling on the motion for a preliminary injunction leaves open the final determination of the merits of the case."). But cf. *Ranchers Cattlemen Action Legal Fund United Stockgrowers* v. *USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007) (noting that court of appeals' "conclusions on pure issues of law" from the "preliminary injunction phase" are law of the case). Petitioner's illusory circuit split could vanish when the Ninth Circuit squarely addresses this issue, so review in this Court is unnecessary.

3. This Court has rejected certiorari petitions similar to petitioner's, further suggesting the

absence of a genuine circuit split. Prior to *Warsoldier*, this Court denied two petitions seeking review of decisions that rejected RFRA challenges to prison grooming codes. See Petition for Writ of Certiorari, *Harris* v. *Chapman*, 520 U.S. 1257 (1997) (No. 96-8753); Petition for Writ of Certiorari, *Hamilton* v. *Schriro*, 519 U.S. 874 (1996) (No. 96-5016). Since *Warsoldier* was decided in 2005, this Court has denied three petitions seeking review of decisions that rejected RLUIPA challenges to prison grooming codes. See Petition for Writ of Certiorari, *Bisby* v. *Crites*, 130 S. Ct. 487 (2009) (No. 08-10337); Petition for Writ of Certiorari, *Ragland* v. *Powell*, 549 U.S. 1306 (2007) (No. 06-8887); Petition for Writ of Certiorari, *Hoevenaar* v. *Lazaroff*, 549 U.S. 875 (2006) (No. 05-11756). The petition in this case provides no reason to change course.

4. Petitioner asserts that the nonexistent circuit split over the legality of prison grooming codes "reflect[s] the deeper conflict over just what strict scrutiny means under RLUIPA." Pet. 17. This "deeper conflict" is a fine topic for law review commentary, as seen in the student note cited throughout the petition. Pet. 11, 18, 19 (citing James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053 (2009)). The issue is not suitable for consideration by this Court, however, because its resolution will not change the outcome of petitioner's case and thus is not the subject of "meaningful litigation." See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving

conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.").

Looking beyond his own request for an injunction as to the TDCJ grooming code, petitioner proposes a general inquiry into the appropriate level of judicial scrutiny under RLUIPA. See, *e.g.*, Pet. 4 (asking whether RLUIPA requires more than "a minimal showing that a prison grooming rule is the least restrictive means of furthering a compelling governmental interest"); *id.* at 17 (posing "the fundamental question of how much deference can be given to prison officials consistent with strict scrutiny"). Notwithstanding the supposedly divergent views of the circuits concerning "the meaning of strict scrutiny under RLUIPA," *id.* at 10-11, not one circuit has rendered a final decision on the merits holding that RLUIPA prohibits prison grooming codes. Petitioner contends the "decisions * * * are all over the lot," *id.* at 13, but the spectrum of outcomes is actually quite narrow, ranging from the many circuits that have squarely held that RLUIPA permits prison grooming codes, to the lone circuit that has held that RLUIPA *might not* permit prison grooming codes, see *supra* Sections (1)-(2). It is therefore unlikely that granting the petition to address the so-called "deeper conflict" would upset the judgment of the court below. This Court should decline petitioner's invitation to engage in a purely academic exercise.

5. In the absence of a circuit split over whether RLUIPA forbids prison grooming codes, that issue is best left to percolate in the lower courts. RLUIPA challenges to prison grooming codes are currently under review in the Fourth, Fifth, and Eleventh

Circuits. These cases allow the Court to wait and see whether a circuit split will ever develop.

The Fourth Circuit recently remanded a case for the district court to consider whether South Carolina's forcible grooming policy survives RLUIPA scrutiny. *Smith* v. *Ozmint*, 578 F.3d 246, 248 (4th Cir. 2009). In *Smith*, officers allegedly used physical force and pepper spray against a Rastafarian inmate in the course of shaving his head. *Id.* at 249-250. Facing a RLUIPA challenge, the officers defended the forcible grooming policy by filing an affidavit that had been submitted in a different case involving a different prison population. *Id.* at 252-254. Rejecting this affidavit as "simply not on point," and noting that its prior decisions upholding grooming codes had not involved forcible shaving, the Fourth Circuit vacated the summary judgment for the officers and remanded for further proceedings. *Id.* at 253-254. On remand, the United States District Court for the District of South Carolina granted summary judgment in favor of the officers, after reviewing new affidavits from South Carolina prison administrators. *Smith* v. *Ozmint*, No. 04-1819, slip op. at 16 (D.S.C. Mar. 18, 2010). The inmate's appeal is now before the Fourth Circuit. See Docket Report, *Smith* v. *Ozmint*, No. 10-6526 (4th Cir.).

The Fifth Circuit recently reversed the dismissal of a RLUIPA claim challenging application of the TDCJ grooming code to a prisoner seeking to grow a small patch of hair at the base of his skull, known as a kouplock. *Odneal* v. *Pierce*, 324 F. App'x 297, 302 (5th Cir. 2009) (per curiam). Noting that "there may be distinctions * * * between the security risks presented by prisoners maintaining a full head of

long hair and those wearing a small patch of long hair at the base of their skulls," the Fifth Circuit concluded that its prior decisions upholding grooming codes were not controlling. *Id.* at 301. The Fifth Circuit remanded for further proceedings on the RLUIPA claim concerning the kouplock, *id.* at 302, which are currently underway in the United States District Court for the Southern District of Texas, see Docket Report, *Odneal* v. *Dretke*, No. 04-454 (S.D. Tex.).

The Eleventh Circuit likewise remanded a RLUIPA case to the district court for "a full evidentiary hearing and bench trial" on the issue whether Alabama's grooming code is the least restrictive means of furthering the compelling governmental interest in prison security. *Lathan* v. *Thompson*, 251 F. App'x 665, 667 (11th Cir. 2007) (per curiam). The Eleventh Circuit, which had previously upheld prison grooming codes against RFRA and RLUIPA challenges, "note[d] that the evidentiary record relating to the hair-length claims is over ten years old and that, in the intervening time, prison staffing and administration, prison safety and security, and the prison population in Alabama have changed." *Id.* Proceedings are currently underway in the United States District Court for the Middle District of Alabama. See Docket Report, *Limbaugh* v. *Thompson*, No. 93-1404 (M.D. Ala.).

The legality of prison grooming codes under RLUIPA is the subject of active litigation in several circuits. The foregoing cases could produce a circuit split where none currently exists. In the meantime, review in this Court is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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